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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re Marriage of DRU GASH and LIMOR BEN-NOUN.	B287073 (Los Angeles County Super. Ct. No. LD056298)
DRU GASH, Appellant, v. LIMOR BEN-NOUN, Respondent.	

APPEAL from an order of the Superior Court of Los Angeles County, Shirley K. Watkins, Judge. Affirmed.

Robert F. Smith for Appellant.

No appearance for Respondent.

Dru Gash (father) appeals from an order allowing his former wife, Limor Ben-Noun (mother), to relocate with their daughter to Israel. We affirm the order.

BACKGROUND

Father and mother's marriage was dissolved in 2011. They have a daughter, who was born in 2009. Under a stipulated judgment, mother had sole legal custody of the child for 18 months, commencing in December 2010. She also had primary physical custody, but father had scheduled unsupervised visitation.

In November 2013, the family court issued a detailed "statement of decision and final findings and orders." (Capitalization omitted.) Based on domestic violence restraining orders that had been issued against father, the family court found that the presumption in Family Code section 3044[1] applied and that father had failed to rebut it.[2] The family court also applied the presumption in section 7501 that because mother had, pursuant to prior orders of the court, been awarded sole legal and physical custody of the child, she was entitled to change the child's residence absent a showing of detriment to the child. Father, however, did not make such a showing. The family court concluded it was in the child's best interests to be allowed to relocate with mother to Israel. Therefore, the award of sole legal

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[1] All further statutory references are to the Family Code.

[2] The section creates a rebuttable presumption that an award of sole or joint physical or legal custody to a person who has perpetrated domestic violence is detrimental to the child's best interests.

and physical custody of the child to mother was continued. The family court set forth a visitation schedule for father, both until the child relocated and after relocation.

Mother and child did not immediately relocate. Instead, in May 2016, mother filed another request for an order to relocate with the child to Israel. As for father, he asked to change custody and to vacate the 2013 order.

After an evidentiary hearing that took place over 20 plus days, the family court issued its final statement of decision and findings of fact in October 2017, which largely followed the prior 2013 order. The family court concluded it was in the child's best interest for mother to continue to have sole legal and physical custody and to move to Israel, it was not in the child's best interest for father to share or to have sole legal or physical custody, and father failed to rebut the presumption in section 3044.

The family court based these conclusions on numerous findings of fact. They included that father had a felony conviction and had served time in custody for violating probation. Yet, he failed to disclose the violation to the court when examined about it. Father had also failed to learn from parenting and batterer's intervention classes and concentrated more on his needs than the child's needs. Indeed, he continued to deny that he had engaged in domestic violence. Father's irresponsibility in paying child support mitigated against him having primary physical custody. He failed to show he was working full time and paying down child support arrears. There was also evidence father abused drugs.

Father showed a lack of support for raising the child in the Jewish tradition per the parties' agreement. He gave her a cross necklace, causing the child "to have a religious identity crisis,

which this court finds Father did on purpose as a way of exploiting his daughter's love for him and to harass the Mother." He deliberately caused the child to miss important religious observances and asserted "equal religious observances," contrary to the parties' agreement.

Father tried to exert "passive aggressive control" over mother by being late for exchanges of the child. He refused to give the child prescribed medications. And, in violation of a court order, father planned to take the child to Mexico.

As to mother, her cooperation with father and consideration of the child's needs had improved. The family court found no credible evidence that bad faith or ill will motivated mother's move to Israel.

The family court noted that since the original November 2013 order father's time share had increased to 25 percent. Nonetheless, the family court found that sole legal and physical custody should remain with mother. Thus, the family court adopted the prior schedule in the 2013 order, although the court modified it to give father visitation in Los Angeles during the child's spring and winter breaks and for 30 days during the summer. However, the family court thereafter eliminated the spring and winter break visits and instead ordered that the custody plan be per the November 2013 order once the child moved to Israel. That is, in addition to visits with the child in Israel should father travel there, mother must bring the child to Los Angeles for three weeks each summer.[3]

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[3] On January 3, 2018, father filed a petition for a writ of supersedeas to stay the move-away order. We denied the petition. We grant father's request to take judicial notice of the accompanying exhibits to the petition.

DISCUSSION

The general rule is that a parent having child custody is entitled to change residence unless the move is detrimental to the child. (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 35 (*Burgess*); § 7501.) The noncustodial parent bears the initial burden of showing that the proposed relocation of the child's residence would cause detriment to the child, requiring a reevaluation of custody. (*In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1078.) In assessing detriment and prejudice to the child's welfare as a result of relocating and whether to modify a custody order, the family court may consider the child's interest in stability and continuity in the custodial arrangement; the distance of the move; the child's age; the child's relationship with both parents; the parents' relationship including their ability to communicate and cooperate effectively and their willingness to put the child's interests above their individual ones; the child's wishes, if appropriate; the reasons for the move; and the extent to which the parents currently share custody. (*Id.* at p. 1101.)

In an initial custody determination, a trial court, considering all the circumstances, has the widest discretion to choose a parenting plan that is in the child's best interests. (*Burgess*, *supra*, 13 Cal.4th at pp. 31–32; § 3040, subd. (b).) But where, as here, "after a judicial custody determination, the noncustodial parent seeking to alter the order for legal and physical custody can do so only on a showing that there has been a substantial change of circumstances so affecting the minor child that modification is essential to the child's welfare." (*Burgess*, at p. 37.) If the noncustodial parent meets that initial burden, then the trial court must perform the "delicate and difficult task of determining whether a change in custody is in the best interests"

of the child. (*In re Marriage of LaMusga*, *supra*, 32 Cal.4th at p. 1078.)

In general, we review custody and visitation orders for an abuse of discretion. (*Burgess*, *supra*, 13 Cal.4th at p. 32.) In child custody cases, a trial court abuses its discretion if there is no reasonable basis on which the court could conclude its decision advanced the child's best interests. (*F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 15.) An abuse of discretion may also be found when the trial court applied improper criteria or made incorrect legal assumptions. (*Ibid.*) "When applying the deferential abuse of discretion standard, 'the trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.' " (*In re C.B.* (2010) 190 Cal.App.4th 102, 123.)

Father cannot meet his burden. As appellant, father bears the burden of affirmatively showing prejudicial error and, to satisfy this burden, he had to provide an adequate record to assess error. (*Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324.) Although father appeals from an order issued after an evidentiary hearing that spanned about 20 days, he has not provided a record of the hearing. "Where no reporter's transcript [or settled statement] has been provided and no error is apparent on the face of the existing appellate record, the judgment must be *conclusively presumed correct* as to *all evidentiary matters*. To put it another way, it is presumed that the unreported trial testimony would demonstrate the absence of error." (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992; see Cal. Rules of Court, rules 8.130, 8.134, 8.137.) A judgment or order of a lower court is "presumed to be correct on appeal, and all intendments and

presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133; see *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

In any event, the limited record before us reveals no abuse of discretion on the grounds father asserts. He asserts there is no compelling need for mother to relocate to Israel. However, a custodial parent seeking to relocate bears no burden to show it is necessary to do so. (*Burgess*, *supra*, 13 Cal.4th at p. 29.) Father also contends that mother cannot be relied on to honor the visitation schedule, but this is not a proper challenge to the order. Next, father argues that mother did not renew a 2016 bond and did not register the move-away order. However, father has not shown that he raised these issues in the trial court. It is generally improper for an appellant to raise new issues for the first time on appeal. (*JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 178.)

Father complains that the family court improperly modified his visitation on an ex parte basis without giving him an opportunity to be heard, in violation of section 3064. Section 3064, subdivision (a) provides that a court "shall refrain from making an order granting or modifying a custody order on an ex parte basis unless there has been a showing of immediate harm to the child or immediate risk that the child will be removed" from the state. The record does not show a violation of that section. It appears that soon after the family court issued the October 2017 order, mother requested clarification of the visitation schedule. She pointed out the difficulty in complying with it because children in Israel only get a one-week break in the winter and about 10 days in the spring for Passover. Mother requested a hearing to be scheduled for November 8, 2017, and

the record contains a notice to father. Although unclear if the hearing actually took place on November 8, 2017, at some point the family court heard "argument of counsel."[4] After taking the matter under submission, the family court issued an order amending the final statement of decision to, in essence, reduce visitation in Los Angeles to three weeks in summer. The record thus does not clearly establish that the family court modified the visitation schedule ex parte without giving father an opportunity to be heard.

Finally, father contends that his religion played a role in the family court's decision. The family court merely made an express finding that father caused the child "to have a religious identity crisis" to exploit his child's love for him and to harass mother. Hence, it was father's failure to respect his agreement to raise the child in the Jewish faith that factored into the family court's decision, not father's religion.

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[4] The record does not contain a minute order from any November 8, 2017 hearing.

DISPOSITION

The order is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

LAVIN, J.